

EXPERT ANALYSIS

Emerging Case Law Exposes ‘Bot’ Makers To DMCA Absent Copyright Infringement

By Nancy A. Del Pizzo, Esq.
Rivkin Radler LLP

Hacking into a video game platform to create an automated software application, known as a bot, that enables users to cheat in playing the game may be as regular as the sun coming up in the morning — but it also raises legal concerns.

Niantic Inc., the maker of “Pokemon Go,” has initiated a ban on third-party bots like Pokevision and Necrobot — both of which were designed to enable “Pokemon Go” users to cheat in the game to move ahead more quickly. It appears to be largely successful in preventing gamers from using bots to cheat, though new bots are likely being developed.

The problem is so widespread that another company, Blizzard Entertainment Inc., is pretty much singlehandedly helping to produce a body of law in this area. Blizzard develops and produces games such as “Overwatch,” “Diablo” and “World of Warcraft,” the massively multiplayer online role-playing game, known by fans as WoW.

Blizzard has enjoyed some success in a case that made its way to the 9th U.S. Circuit Court of Appeals, and it has been able to fine-tune its claims in a subsequent case.

Some of Blizzard’s claims against bot makers are fairly standard, such as claims of copyright and trademark infringement, unfair competition, unjust enrichment and tortious interference with contract. But Blizzard has also pushed for development of new law under the U.S. Copyright Act, 17 U.S.C.A. § 101, and the Digital Millennium Copyright Act, 17 U.S.C.A § 1201, based on claims that bot makers have distributed technology designed to thwart access controls embedded in its copyrighted games.

BOT CREATORS ENTER THE COURTS

It took a bot maker to spur these developments in video game law.

Specifically, in 2006, bot creator MDY Industries and its sole member, Michael Donnelly, filed a declaratory judgment action against Blizzard concerning WoW.¹

MDY’s lawsuit sought a declaratory judgment that the plaintiffs’ software program Glider did not infringe Blizzard’s copyright or other rights to the game.

To understand the claims, one must understand a bit about how the game is played.

To play WoW, a gamer must install software on a computer and connect to the game’s online servers. This access is available on a subscription basis.

Before installing the game, a player must read and accept Blizzard’s end user license agreement. Also, before being able to create an account and connect to the online service, a player must agree to Blizzard’s terms of use. If a player does not accept the terms of the EULA and TOU, he can get a refund.



Blizzard Entertainment has pushed for development of new law based on claims that bot makers have distributed technology designed to thwart access controls embedded in its copyrighted games.

Donnelly, a software programmer, was a WoW player who initially developed Glider for his personal use.

WoW permits players to interact with each other in a virtual format as they try to advance through the game's levels. Donnelly developed Glider to automatically play the early WoW levels.

Glider operates by taking over the tasks of moving the mouse and pushing keys after a player provides certain information about his in-game character and what he wants that character to do.

Essentially, its purpose is to enable players to set up the game and let Glider independently move ahead in it by obtaining "experience and loot."

Blizzard learned about Glider in late 2005 after the video game company had launched Warden, a software program designed to prevent players from using unauthorized third-party software in conjunction with playing WoW by blocking their access to the game's server. After Warden detected Glider use, Blizzard barred players using Glider from WoW's servers.

MDY then modified Glider to avoid detection and began promoting that feature on its website, offering gamers "additional protection from game detection software" for a fee.²

In response to the bot makers' suit, Blizzard filed a seven-count counterclaim against MDY and a third-party complaint against Donnelly for tortious interference with the WoW end-user license agreement; contributory and vicarious copyright infringement under Section 501 of the Copyright Act, 17 U.S.C.A. § 501; violations of the DMCA, 17 U.S.C.A. §§ 1201(a)(2) and (b)(1); trademark infringement under the Lanham Act, 15 U.S.C.A. § 1125(a); unfair competition; and unjust enrichment.

Interestingly, MDY also included on its website a statement that Glider's users were violating Blizzard's terms of use. Glider became profitable for MDY: By September 2008, it had accumulated "gross revenues of \$3.5 million based on 120,000 Glider license sales."³

THE DANCE BETWEEN THE DMCA AND COPYRIGHT INFRINGEMENT

By the time the case reached the 9th Circuit, the issues before the court concerned copyright infringement, potential DMCA violations and the state law claim of tortious interference with contract.

In a case of first impression, the 9th Circuit held that MDY — and potentially other bot makers — could be liable under Section 1201(a)(2) of the DMCA, 17 U.S.C.A. § 1201(a)(2), even without a finding of copyright infringement.

First, the court noted that Section 1201 of the DMCA creates two distinct claims: Section 1201(a)(2) prohibits circumventing any technological measures that would control access to a protected work, while Section 1201(b) prohibits trafficking in technologies primarily designed to circumvent technological copyright-protection measures.

The court found the DMCA's prohibition on circumventing access controls is enforceable even where there is no actual copyright infringement.

Accordingly, the court said Section 1201(a) "creates a new anti-circumvention right distinct from copyright infringement, while Section 1201(b) strengthens the traditional prohibition against copyright infringement."⁴

The DMCA's legislative history drove the court's decision.

For instance, the court noted that law-makers determined that one can be liable under Section 1201(a) without having a nexus to infringement where an owner effectively protects access to its copyrighted work with a password and a person or entity finds a way to defeat or bypass the password.⁵

The legislative record also analogized circumventing technological protections to breaking into a locked room to grab a copyrighted book, the court said. Breaking a lock to read a book would

not infringe on the copyright owner's rights under Section 106 of the U.S. Copyright Act, the court said. Similarly, bypassing a password or circumventing technological protections would not be copyright infringement, it added.⁶

Interestingly, the 9th Circuit conceded that the Federal Circuit has adopted a different approach to the DMCA — namely, an approach that requires a Section 1201(a) plaintiff to show the circumventing technology infringed or facilitated copyright infringement.⁷

The 9th Circuit said it appreciated the policy concerns highlighted in the Federal Circuit's decision. But it declined to follow its sister circuit's approach, saying it was contrary to the statute's plain language.

TORTIOUS INTERFERENCE: HOW BOTS AFFECT COMPANIES AND USERS

A careful review of how the court resolved the state-law tortious interference claim is valuable because the court found all but one element was met for purposes of summary judgment. Thus, the case is a learning tool for asserting a tortious-interference claim against a bot maker in the 9th Circuit, where many video gaming companies are based.

Blizzard's tortious-interference claim was based on allegations that by offering Glider to WoW gamers, MDY caused those gamers to breach Blizzard's TOU and EULA. The 9th Circuit agreed Blizzard met four of the five elements of a tortious-interference claim under Arizona law. The court reversed summary judgment only because it found disputed issues of fact on one element: whether MDY's actions were improper.⁸

Resolution of this issue hinged on several factors, including whether Glider provides an advantage to WoW gamers who use it, whether Glider strained Blizzard's servers because "bots spend more time in-game than do human players," whether Blizzard's TOU prohibited bots before MDY began selling Glider and whether Glider enhanced gamers' experience in the game.

A software program that circumvents a gamer's consent to an end user license agreement or a terms of use may seem like a straightforward case of tortious interference. But this case highlights a need to call attention to the effect of the bot on not only the game's maker but also its players. Undoubtedly, video gaming companies are better able to fine-tune such a claim as a result of this decision.

BLIZZARD CONTINUES TO BUILD BODY OF LAW

Blizzard continues to lead the charge in creating a body of case law dealing with these issues.

For instance, in 2015, Blizzard filed a similar lawsuit against James Enright, the alleged software writer of various bots designed to allow users of several Blizzard games, including WoW, to manipulate the games to their advantage.⁹

And just a few months ago, Blizzard sued the German company Bossland GmbH, the maker of the bot "Watchover Tyrant," which allegedly gives gamers an edge when playing Blizzard's "Overwatch" game. That lawsuit was filed July 1. As of this writing, neither an answer nor response motion had been filed.

Notably, front and center in that complaint is a DMCA claim for "trafficking in circumvention devices."¹⁰

Blizzard claims Bossland designs and sells malicious software bots specifically designed to thwart Blizzard's access controls to its copyrighted games, violating Section 1201(a)(2) of the DMCA, 17 U.S.C.A. § 1201(a)(2).

This claim focuses on the "locks" Blizzard embeds into its software and the "key" the bot maker gives to users — a key that breaches the end-user license agreement to which the players had consented. It does not allege the bot maker committed copyright infringement of Blizzard's software code or other literal elements of its games.

The 9th Circuit found the DMCA's prohibition on circumventing access controls is enforceable even where there is no actual copyright infringement.

CONCLUSION: BOTS BEWARE

In the world of bots and video gaming, the new state of the law is that a DMCA violation can be proven without a showing of copyright infringement. However, it remains to be seen whether the 9th Circuit's interpretation of the DMCA will be adopted by other circuits in light of the Federal Circuit's decision.

Perhaps this issue will reach the U.S. Supreme Court, which has signaled an interest in intellectual property cases, having granted certiorari for a number of them in 2016.

NOTES

¹ Complaint, *MDY Indus. LLC v. Blizzard Entm't Inc.*, No. 06-cv-2555 (D. Ariz. Oct. 25, 2006), 2006 WL 8421765.

² Answer and counterclaims, *MDY Indus. LLC v. Blizzard Entm't Inc.*, No. 06-cv-2555 (D. Ariz. Feb. 16, 2007), 2007 WL 9627468.

³ See *MDY Indus. LLC v. Blizzard Entm't Inc.*, 629 F.3d 928 (9th Cir. 2010), as amended on denial of reh'g (Feb. 17, 2011).

⁴ *Id.* at 948.

⁵ *Id.* at 946-47, citing S. REP. No. 105-190, at 12 (1998).

⁶ *Id.* at 947, citing H.R. REP. No. 105-551(I), at 17 (1998).

⁷ See *Chamberlain Grp. Inc. v. Skylink Techs. Inc.*, 381 F.3d 1178 (Fed. Cir. 2004).

⁸ *MDY Indus.*, 629 F.3d at 955-57.

⁹ Complaint, *Blizzard Entm't Inc. v. Enright*, No. 15-cv-1840 (C.D. Cal. Nov. 9, 2015), 2015 WL 12645533. However, according to the docket, Blizzard dropped the suit in March of this year.

¹⁰ Complaint, *Blizzard Entm't Inc. v. Bossland GmbH*, No. 16-cv-4860 (C.D. Cal. July 1, 2016), 2016 WL 3615440.



Nancy A. Del Pizzo is a partner at **Rivkin Radler LLP** in Hackensack, New Jersey. Her practice focuses on intellectual property and commercial litigation as well as privacy, data and cyberlaw. She can be reached at nancy.delpizzo@rivkin.com.